ADR OPTIONS UNDER AUSTRALIAN CONSTRUCTION CONTRACTS
THE CASE FOR SINGLE PERSON DISPUTE BOARDS
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The building and construction industry in Australia use a large number of different standard forms of contract. These standard forms are often modified extensively, resulting in the interpretation of standard terms and phrases becoming uncertain. Bespoke General Conditions of Contract used in many industries and by some Principals generally transfer all or most risks to the Contractor.

How standard forms of contract are used and for what type of project in Australia, has been the subject of several studies and reports over recent years.

Some of the more recent reports provide enlightened reading for anybody involved in the drafting and administration of construction contracts in Australia:

1. Standard Forms of Contract in the Australian Construction Industry Research Report by Melbourne Law School, chaired by Professor John Starkey. June 2014

2. Scope for Improvements 2014 by Ashurst Australia, Australia Constructors Association and Infrastructure Partnerships Australia

3. Standard Form of Contracting; the Role for FIDIC Contracts Domestically and Internationally by Toby Shnookal and Dr. Donald Charrett – 2010

4. Guide to Global Construction Dispute Resolution published by Clyde & Co 2015

The most used standard form of contract includes AS2124 and AS4000 (1). High value infrastructure and mining projects tends to use heavily modified Australian Standard Contracts with about 10% using FIDIC contracts, also extensively amended, mostly to transfer more risk to the Contractor.

The consensus from all the reports indicates that over 60% of projects use standard forms, and that of these 60-80% are amended, and that the amendments mostly involved changes to the risk allocation, which in turn is believed to lead to increased cost and more claims (1).

The Ashurst/ACA report observes that:

"*The trouble with many of the standard forms of contracts is that they are quite old now and so heavily amended in most projects that they are not serving the purpose they were originally intended for. They do not allow contractors to quickly and efficiently appreciate the risk profile for any specific project."* (2)

The first standard General Conditions of Contract in Australia was the CA24 published by the Institution of Engineers in 1952. This was amended over the years and eventually became AS2124 in 1978 when it was published by Standards Australia.

The AS 2124 – 1992 edition took the NPWC/NBCC (National Public Works Conference and National Building and Construction Council) Joint Working Party publication NO DISPUTE into account. This publication was based on a report first published in 1988 as "Strategies for the Reduction of Claims and Disputes in the Construction Industry – A Research Report, which led to the establishment of a Joint Working Party comprising senior representatives from all major groups in the industry.

The AS 2124 became AS 4000 in 1997 intended to replace AS 2124

In January 2015 AS 11000 draft (noted as revision of AS 2124 – 1992 and AS 4000 – 1997) was released for comments.

In Australia, the General Conditions of Contracts and often numerous Special Conditions of Contract are frequently prepared by lawyers with very little input from the Engineering and Building fraternity who will be responsible for the day to day implementation and interpretation of the contract conditions. The Australian General Conditions of Contract reflect a different philosophy to the General Conditions of Contract used internationally such as the various FIDIC General Conditions of Contract and the New Engineering Contracts (NEC) published by the Institution of Civil Engineers in the UK.

In their introduction to ECC contracts, the ICE states that:
"The ECC is the first of what could be termed a 'modern contract' in that it seeks to holistically align the setting up of a contract to match business needs as opposed to writing a contract that merely administers construction events.
The whole ethos of the ECC, or indeed the NEC suite generally is one of simplicity of language and clarity of requirement. It is important that roles and responsibilities are equally clear in definition and ownership"

The draft AS 11000 attempts to bridge the gap between the old standard forms and the new international forms, and it provides, inter alia that the "Overriding

obligations" of the Contract is one of "Good faith" Mutual trust, cooperation and good faith
"The Principal and Contractor each agree:
(a) to act reasonably in a spirit of mutual trust and cooperation, and generally in good faith towards each other; and
(b) that such action shall not derogate from their obligations to comply with the Contract."

I wonder how these obligations in AS 11000 will sit with the recent trend to amend Contracts to exclude the doctrine of "contra proferentum":

- The risks will now become unidentifiable and very difficult to price on any project, with the intention clearly to give the Principal an "unfair" advantage.
- This doctrine is embedded in Civil Codes around the world, in which jurisdictions a contractual clause to exclude it from a Contract would be void.

Where are we heading in Australia with these trends? The JWP "No Dispute" was for a while the new bible for construction contracts. It also advocated mutual understanding and trust between the parties as an objective in the dispute resolution process.

The "No Dispute" provided:
Summary of guidelines for Dispute Resolution (1990)

- Encourage, facilitate and expedite genuine negotiation
- Avoid legal representation
- Avoid arbitration and litigation processes
- Specify compulsory conferences of senior management of both parties before embarking on formal third party processes
- Concentration on cost mitigation of the problem area, rather than procrastination about negotiating and resolving the dispute.
- Be cost-conscious, contemplating end financial implications of resolution processes once genuine negotiation have failed
- Encourage use of alternative dispute resolution processes

25 years later

- Do we use these guidelines today?
- We still have excessive legal representation. Just consider SOP submissions, which are now regularly prepared by legal advisors which was not the original intention of the Act.
- Do government bodies adhere to the guidelines and principles of "No Dispute" – no reference in GC21
- Non-government contracts seem to be heading back to the pre-"No Dispute" regimes, by amending the standard forms of contract.

Most amendments to standard forms are carried out by external legal advisers to the Principal or by the Principals in-house legal advisers (refer Sharkey report).

In contrast, FIDIC and ECC conditions of contract are drafted by civil engineers and are published by the International Federation of Consulting Engineers and the Institution of Civil Engineers respectively. Whilst there is an increasing trend by some to modify the standard FIDIC conditions of contract, mainly to re-allocate risk, the majority of FIDIC Contracts are not modified.

During the tender stage, Contractors will attempt to identify all potential risks, and once identified the risks will be assessed and costed and included in the tender price. The Principal regularly amend the standard form of contract mainly to transfer more risk to the Contractor, and it is also becoming trendy to exclude the rule of "contra proferentum", which would traditionally interpret any ambiguities arising from such amendments in favour of the Contractor. The Tenderer is not always able, during a tender process, to properly assess the cost implications arising from multiple amendments to the contract, and will have to make his own assessment of the potential cost implications and include this in his tender.

In a competitive bidding process, the successful bidder is often the one that has underestimated the risks, or one who has already identified ambiguities arising from the amendments to the Contract and may plan to recover costs in the form of claims.

The claims and dispute procedures under the Contract are therefore important, and a fair and quick procedure has the potential to save time and money for both the Principal and the Contractor. Of course, it can be argued that delaying payment claims is to the Principal's advantage, which is perhaps why some of the ADR options in Australia can be very protracted. This advantage has been greatly reduced by the introduction of SOP in all States and Territories.

It seems surprising that claims and dispute procedures under Australian contracts remain largely the same today as they were before the introduction of SOP nearly 15 years ago.

SOP adjudication under various state legislations is a separate form of ADR. It is generally a very quick process, but because of the very tight time restraints, may provide "rough" justice and only offer an interim solution to a dispute. There are also distinct advantages with the Claimant who can spend months preparing sophisticated claims, which the Respondent must address within a very limited time span.

I have compared the various ADR options currently being used on the more popular construction contracts in Australia, and also some less known options such as

Dispute Advisory Services also known as Facilitation and the use of Single Person Dispute Boards termed Single Dispute Board Members (SDBM) or Dispute Review Expert (DRE) under FIDIC contracts.

The ADR procedures to resolve disputes on a Construction Contract ought to be cost effective and provide for fair and speedy resolution of disputes with some finality. Ideally the rules and procedures for resolving disputes should be embedded in the Contract documents and the Dispute Resolver should be appointed at the commencement of a project. It would also be beneficial to the contracting parties if the contractual ADR option could work in some harmony with the SOP. Many of these principles have been included in International Contracts such as FIDIC and ECC.

The three main standard conditions of contract in use in Australia for construct only contracts where a Superintendent is engaged to administer the contract are AS4000, AS2124 and GC21. If we include Design and Construct Conditions of contract, AS4300 leads the way and is the single most used standard form in Australia considering all forms of contract. Other standard forms include the ABIC, MBA forms and FIDIC.

This information is based on survey results from 250 respondents from Research Report into Standard Forms of Contract in the Australian Construction Industry by Professor John Sharkey AM, Matthew Bell, Wayne Jocic and Rami Marginean dated June 2014 (Sharkey report).

Australia has a population of approximately 23 million (2013) and we use 8 different SOP regimes and many different forms of contract. It is clear that we need to get our Acts together and come up with a uniform approach with regards to both SOP and standard forms of Contract. Our current lack of a uniform approach is inefficient and wasteful.

It is interesting to note the dispute resolution provisions contained in the NEC suite of contracts, particularly the Engineering and Construction Contract (ECC3) and how in some countries, particularly the UK, the funding agencies and executing agencies have tried to standardise the forms of contracts as well as dispute resolution procedures.

In the UK, the “OGC” (Office of Government Commerce) recommends the use of NEC3 by public sector construction procurers on their construction projects” and internationally the Multinational Development Banks all have similar procurement policies and are mostly using FIDIC forms of contract which mandates Dispute Adjudication Boards for the dispute resolution process.

DISPUTE RESOLUTION PROCESSES COMMONLY IN USE IN AUSTRALIA.

1. Mediation
2. SOP
3. Arbitration
4. Expert Determination
5. Dispute Boards – 3 member boards
6. Litigation

Less known forms of ADR includes:

1. Single Person Dispute Board (SDBM or DRE)
2. Dispute Advisory Services (Hong Kong model)
3. Facilitation – similar to above.

MEDIATION

This is often included as the first step in a tiered approach to dispute resolution on some contracts and the courts may also require the parties to have attempted mediation before the courts will hear a matter. In my experience mediation is rarely successful in construction disputes and the parties will already have spent a lot of time in face-to-face meetings and conferences before a dispute is elevated to a more formal level. A proactive mediation procedure, which then becomes a conciliation/facilitation process, has been used with some success in Hong Kong and also in some ICC procedures.

ARBITRATION

This is a well established process, but under current procedures this can be long-winded and costly, but it will eventually deliver a fair and robust decision in most construction disputes. It is the default ADR procedure under AS 2124 and AS 4000.

IAMA developed procedures for a fast track arbitration process some years ago, but the concept has not, to my knowledge, been widely used.

EXPERT DETERMINATION

This is a well-known ADR process in Australia and it is entrenched in some government forms of contract, such as the GC21 used in NSW, for disputes up to a value of $ 500,000.

Depending on the Rules, it can be a relatively quick process and the outcome will generally be determined on written submissions only. The Expert Determination will

normally give reasons and will be contractually “Final and Binding” with no recourse to litigation or arbitration.

IAMA have produced standard Rules and Procedures for Expert Determination, but some contracts provide variations to these.

DISPUTE BOARDS

When discussing Dispute Boards, I have used the term Dispute Boards to include all types of Dispute Boards such as Dispute Adjudication Boards and Dispute Avoidance Boards (DAB), Dispute Review Boards (DRB), Dispute Resolution Board (DRB), Conciliation Boards, Mediation DRBs and Single Member Dispute Boards (SMDB). These are all variations of the Dispute Board concept and have similar rules and procedures. The Australian practice is still in its early stages and is modelled on the American DRBF procedures, which delivers non-binding recommendations.

The most used DB model is the FIDIC and ICE Dispute Adjudication Board model which delivers binding determinations becoming “Final and Binding” if a Notice of Dissatisfaction is not lodged by one of the Parties within 28 days. ICC also has standard procedures for DABs, very similar to FIDIC. In developing countries it is necessary to have a determinative outcome, because if payment of a claim is to be optional, it will never be authorised.

SINGLE DISPUTE BOARD MEMBER (SDBM)

FIDIC Single Dispute Board Member provisions apply to projects of any size. Single Person Dispute Boards have been viable on project with values as low as $2mill, and below. At the other end of the scale the limit may only be set by the complexity of the project.

Many projects are suitable for Single Person Dispute Boards even if the value runs into hundreds of millions of dollars. It should also be noted that Dispute Boards should not be tied the dollar value of a project. A USD100 million project in a developing country may involve the construction of 100km of two lane highways or 60km – 80km of 4 lane motorways employing upwards of 2000 people.

Road projects are generally technically simple and straightforward and do not in my opinion, require a 3 person Dispute Board as a rule. I was part of a negotiating team a few years ago, which successfully argued for the establishment of a SDBM on a major road project in Afghanistan with a Bid value of around USD 450mill. It is of course imperative that the SDBM be suitably qualified, in this case an experienced Civil Engineer who was also listed on the FIDIC President’s List of Approved Adjudicators was appointed at the start of the Contract.

There are several articles and reports published internationally addressing the importance of selecting the DB members with appropriate experience and qualifications.

The use of SDBM is gaining in use around the world, initially instigated by the WB and countries such as Ethiopia and Vietnam, mainly to reduce costs. The ERA has had over 100 road contracts using SDBMs or DREs as they were called under earlier 1987 FIDIC Red Book provisions.. These projects are partly funded by MDBs and the SDBMs are generally recruited from the FIDIC or Institution of Civil Engineers (ICE) lists of approved dispute adjudicators.

The use of SDBM is very relevant to Australian construction contracts, and there are many privately funded as well as Local Government contracts, which could successfully benefit from the use of SDBMs, particularly if Adjudication DBs could be introduced to work with the SOP legislation.

DISPUTE ADVISOR/FACILITATOR

The NSW committee of IAMA is considering the establishment of an IAMA Dispute Avoidance Advisory (DAA) model, which would offer an alternative to existing ADR services used in building and construction contracts in NSW including DRB.

The DAA is based on the DRA system used for over 20 years in Hong Kong. The DRA is a one-person standing board set up in the conventional manner at the commencement of a construction project. In all cases, the DRA is appointed by agreement between the owner and the contractor immediately after the construction contract is signed. The DRA fees are paid equally by the parties.

DRAs are selected for their experience in the construction industry and for their mediation skills. Many are also familiar with the arbitration process.

In the HK DRA system, the DAA may prepare a report on particular disputed matters only. Such reports are confidential and are to be seen only by senior representatives of the Contractor and the Owner/Principal. This is standard for all Hong Kong DRA systems.

The Hong Kong Construction Industry Council (HKCIC) Guidelines provide for similar timeframes and the role of the DRA is largely the same as provided for in RICS and other articles. However the CIC guidelines specifically provide that the choice of dispute resolution methods should be provided in the Contract for the contracting parties to choose:

i) Mediation
ii) Adjudication
iii) Independent Expert Certifier Review
iv) Expert Determination
v) Short Form Arbitration

The DRA will assist the Parties in choosing the most appropriate Dispute Resolution mechanism.

STATUTORY ADJUDICATION PROCESSES

1. Adjudication DRBs – recent proposals from the UK to be part of the statutory adjudication process adopted in the UK by the Housing Grants Construction and Regeneration Act of 1996. This concept allows the Parties to a Contract to choose the Adjudicator(s) at the start of the Contract and to keep the Adjudicator(s) for the duration of the Project, and to determine any disputes, which would normally be referred to an ANA under the Act.

   "Within the UK it is entirely possible for the contracting parties to establish a DB to adjudicate construction contract disputes within the statutory requirement for adjudication . As yet, there are no statutory requirements for DBs to be established to adjudicate disputes under construction contracts. It is, however, possible to establish a DB to act as the Adjudicator within the UK statutory adjudication regime and this is an approach currently being taken on several large projects." (P. Chapman - **Dispute Boards on Major Infrastructure Projects)**

The WA Act allows the appointment of an Adjudicator at the start of the project and this would also have the effect of establishing a permanent Dispute Single Person Board at the start of the project.

COMPARISON OF CONTRACTUAL PROCEDURES CURRENTLY IN USE

I have compared the normal procedures for each option as they are listed in current and draft Australian Conditions of Contract. To get an international perspective, I have also considered the dispute resolution procedures of one of the most used International General Conditions of Contract, namely the FIDIC 1999 Red Book and FIDIC MDB.

The times taken to have a Claim assessed or determined under the various forms of contract are shown below:

TIME COMPARISON DIFFERENT GENERAL CONDITIONS OF CONTRACT

GC of C	Decision on a claim from start of event	Contractual ADR decision from start of event
AS 11000	90	110days + DB decision
AS 4000	56	126 days - referral to arbitration
GC21 Edition 2	56	215++ Expert determination

AS 2124	42	56 days referral to arbitration
FIDIC	84	168 Binding decision 192 Final and Binding decision

Under all these contracts, except FIDIC, one has to add the time taken for the Parties to agree on a Dispute Resolver and to have that person appointed and familiarised with the dispute. This is likely to take at least several additional months, and that is if the Parties can agree on various aspects of the process, accommodate hearing dates etc. Each claim is likely to take at least another 120 to 150 days before a final determination is forthcoming, probably more like 200 plus days. This makes the total time under existing ADR provisions for Australian standard contracts in the order of 8 to 12 months. This is a long time for the Contractor to be without payment, and why SOP determinations are popular with claimants. The possible challenge to adjudication determinations must always be considered, as the process is very fast tracked the potential for mistakes by the adjudicator ever present.

If we bear in mind that the SOP adjudications are only intended to be binding in the interim, it makes sense to have another determinative dispute resolution process included in the contract, which can review and override any SOP determination under the Act and which will be final and binding unless Notice of Dissatisfaction is issued within a certain time; say 28 days.

Thus I am back to my preferred ADR process for all construction contracts, which is a Single Person Dispute Board unless the project is very large and or very complex when a 3 person DB will be appropriate.

Assuming a SDBM is agreed to by both contracting parties, appointed at the start of the Contract, and that the rules listed in Appendix A are adopted, the total time to have a dispute determined should take less than 168 calendar days. Many potential disputes would be resolved during regular site visits and meetings with the SDBM and it is very unlikely that the claimant (normally the Contractor) would proceed with Adjudication under the Act as the Contractual Adjudication process would have the final say.

APPENDIX – A

WHAT IS A DISPUTE BOARD – HOW DOES IT WORK

On a Construction Project the Dispute Board is a creature of the Contract and is established by special provisions in the main Contract. These provisions require that a body be established, normally consisting of 1 or 3 impartial and independent persons with experience in the type of work carried out under the Contract and with experience in the interpretation of contract documentation.

The Dispute Board members are appointed by separate Agreements provided for in the Main Contract to form either an ad-hoc or a permanent body, the latter which becomes an integral part of the project and works closely with the project team to resolve any issues which may potentially develop into disputes, and to adjudicate formal disputes once they occur.

One of the main functions of a Dispute Board is Dispute Avoidance.

The Dispute Board is ideally established at the start of the Contract and the Board will initially be provided with copies of all Contract documentation including plans and construction schedules and will receive regular updates and copies of relevant project reports, weekly, monthly or otherwise to keep abreast of project activities.

As part of keeping up to date the Dispute Board will also make regular site visits and inspect the construction works, meet with the Parties in order to be aware of current issues and encourage resolution of these issues at project level.

By agreement of both Parties, the Dispute Board may also be asked to provide advice or give opinions on any matter, which has not formally been referred to the Board as a dispute. This is an important Dispute Avoidance function of a Dispute Board. This allows the Parties to “test the water” and perhaps get an early explanation of a contract clause or the interpretation of a part of the specification without committing to full on adversarial procedures. The opinions/advice are non-binding and will often result in an amicable agreement between the Parties on the issue in question, thus providing a “win - win” outcome.

These procedures are similar for most types of International Dispute Boards.

Formal disputes are referred to the Dispute Board for resolution within a short period in accordance with the provisions of the Contract. The Dispute Board may determine the dispute by written submission only, by conducting hearings or by using a combination of both. The Dispute Board Procedures and Rules will usually allow the Dispute Board to determine, inter alia, its

"*own jurisdiction and as to the scope of any dispute referred to it*"

and "to conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and the Procedural Rules of the Contract"

and to "adopt procedures suitable to the dispute, avoiding unnecessary delay or expense".

(Extracts from FIDIC MDB Harmonised Contract provisions)

The Dispute Board's decision (FIDIC) or recommendation (DRBF) must be issued within a specified time from the date of the referral, which is 84 days for FIDIC MDB contracts. The Decision must be reasoned and under FIDIC Contract provisions is contractually binding on the parties in the interim and becomes final and binding unless a Notice of Dissatisfaction is issued by one of the Parties within 28 days.

If a Notice of Dissatisfaction has been issued, the dispute may be taken to arbitration in accordance with the arbitration provisions in the Contract. Under a FIDIC MDB contract the matter cannot be referred to arbitration earlier than 56 days after the DB has issued a Decision/recommendation during which period the Parties must attempt amicable settlement. The Decision/recommendation can be submitted as evidence in any arbitration proceedings.

"*Experience shows that very few disputes which have been adjudicated by a competent DRB have been taken to arbitration – the Parties usually accepting the DRB rulings as being impartial, fair and just*" (ICE Dispute Resolution Board Procedures (2005)).

International articles by Peer Dalland can be found on

www.dalland.com.au

TRAINING AND ACCREDITATION OF ADJUDICATORS.

Organisation	Prequalification	Further training	Comments
FIDIC	Individual evaluation of existing qualifications – arbitrator/mediator plus approved 2-6 day course on FIDIC conditions of contract	3 day live-in assessment workshop	FIDIC President's List of approved adjudicators
Dispute Board Federation - DBF	Individual evaluation of existing qualifications and experience. Arbitrator, mediator (not specified, but..) plus approved course on all FIDIC conditions of contract	Accepts persons on FIDIC President's List – or provides further training "Total Immersion Programme" 6 day intensive course on FIDIC contracts	DBF list of approved adjudicators – graded membership. Approved WB and FIDIC training provider
International Chamber of Commerce - ICC	Individual evaluation of existing qualifications and experience	Combined workshops with DRBF and FIDIC	ICC lists –Dispute Boards and Neutrals (Mediators)
ICE	ICE qualifies and appoints adjudicators to act under all forms of contract including NEC3 and ICE Conditions of Contract.		
Dispute Resolution Board Foundation - DRBF	No pre-qualifications	Provides 2 day workshops for potential DB members in association with ICC and FIDIC	No official list, but has an unpublished President's List of Approved DRB members trained to Chair a DRB
World Bank and other MDBs	FIDIC President's List	Through FIDIC/DBF	Procurement Guidelines and Standard Bidding Procedures default to FIDIC MDB Harmonised Conditions of Contract.